

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs June 19, 2007

**ROBERT MITCHELL v. CHERRY LINDAMOOD, WARDEN, and the  
STATE OF TENNESSEE**

**Direct Appeal from the Circuit Court for Wayne County  
No. 14063 Stella Hargrove, Judge**

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**No. M2007-00051-CCA-R3-HC - Filed August 8, 2007**

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The petitioner, Robert Mitchell, was convicted by a jury of multiple offenses. Thereafter, the petitioner filed a petition for a writ of habeas corpus, which petition was dismissed by the habeas corpus court for failure to state a cognizable claim for habeas corpus relief. On appeal, the petitioner challenges the dismissal of the petition. Upon our review of the record and the parties' briefs, we affirm the judgment of the habeas corpus court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Robert Mitchell, Clifton, Tennessee, Pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder and Brian Clay Johnson, Assistant Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

The petitioner was convicted by a jury in the Davidson County Criminal Court of especially aggravated kidnapping, two counts of aggravated kidnapping, and assault. He received a total effective sentence of thirty-seven years in the Tennessee Department of Correction. On June 1, 2006, this court affirmed on direct appeal the petitioner's convictions and sentences. See State v. Robert L. Mitchell, No. M2005-01652-CCA-R3-CD, 2006 WL 1506519, at \*1 (Tenn. Crim. App. at Nashville, June 1, 2006), perm. to appeal denied, (Tenn. 2006).

On September 28, 2006, the petitioner filed in the Wayne County Circuit Court a petition for a writ of habeas corpus, alleging that his trial counsel was ineffective and that the evidence was

insufficient to support his conviction for the kidnapping offense involving his stepdaughter. The habeas corpus court dismissed the petition, finding that “the Petitioner’s judgment is not void, that his sentence has not expired, and that he has failed to even allege claims that would render his convictions void.” The petitioner challenges the habeas corpus court’s dismissal of his petition.

## **II. Analysis**

Initially, we note that the State claims that the petitioner’s appeal should be dismissed because “the petitioner has failed to show that he filed a timely notice of appeal.” However, the record reflects that the habeas corpus court denied the petition on December 13, 2006. Although the technical record from the trial court does not contain a copy of the petitioner’s notice of appeal, this court’s records reflect that a notice of appeal was filed in the Wayne County Circuit Court on December 29, 2006, and a copy was received by the appellate court clerk on January 4, 2007, clearly reflecting that the petitioner’s notice of appeal was timely. See Tenn. R. App. P. 4(a) (stating that generally “the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days” following the entry of the judgment from which the party is appealing).

Regarding the petitioner’s habeas corpus claim, our law provides that the determination of whether to grant habeas corpus relief is a question of law. Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007). As such, we will review the trial court’s findings de novo without a presumption of correctness. Id. Moreover, it is the petitioner’s burden to demonstrate, by a preponderance of the evidence, “that the sentence is void or that the confinement is illegal.” Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, § 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. See Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). However, “[s]uch relief is available only when it appears from the face of the judgment or the record of the proceedings that a trial court was without jurisdiction to sentence a defendant or that a defendant’s sentence of imprisonment or other restraint has expired.” Wyatt, 24 S.W.3d at 322; see also Tenn. Code Ann. § 29-21-101 (2000). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. Taylor, 995 S.W.2d at 83. “A void judgment ‘is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant’s sentence has expired.’ We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal.” Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting Taylor, 995 S.W.2d at 83).

The State contends that the habeas corpus court denied the petition “because the petitioner failed to adhere to the mandatory requirements of Tenn. Code Ann. § 29-21-107 and failed to state a colorable claim for relief.” Our review of the habeas corpus court’s order reveals that the court dismissed the petition because “the Petitioner’s judgment is not void, . . . his sentence has not expired, and . . . he has failed to even allege claims that would render his convictions void.” The order does not contain a finding that the petitioner failed to comply with the procedural requirements for filing a habeas corpus petition. See Tenn. Code Ann. § 29-21-107 (2000). “In such instances,

an appellate court should not then rely on such [procedural] deficiencies to defeat an appeal thereof, but should review the reasons relied upon by the lower court.” Darwin Theus v. David Mills, Warden, No. W2005-02204-CCA-R3-HC, 2006 WL 739883, at \*2 (Tenn. Crim. App. at Jackson, Mar. 23, 2006). Therefore, we will address the ruling made by the habeas corpus court.

In the petition, the petitioner repeatedly complains that his trial counsel was ineffective in representing him at trial. A claim of ineffective assistance of counsel, at best, renders a challenged judgment voidable rather than void; therefore, such an allegation is not a cognizable claim for habeas corpus relief. See Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994). Generally, the “authorized avenue for attacking a voidable judgment is a petition for post-conviction relief.” State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987).<sup>1</sup> Further, in the petition the petitioner complains that the evidence was insufficient to support his convictions. Such a claim is also not a proper claim for habeas corpus relief in that it does not render his convictions void but merely voidable. See Gant v. State, 507 S.W.2d 133, 136 (Tenn. Crim. App. 1973). Moreover, this court previously reviewed this issue on direct appeal and concluded that there was sufficient evidence to support his convictions. See Mitchell, No. M2005-01652-CCA-R3-CD, 2006 WL 1506519, at \*10. Therefore, the habeas corpus court did not err in dismissing the petition.

### **III. Conclusion**

Finding no error, we affirm the judgment of the habeas corpus court.

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NORMA McGEE OGLE, JUDGE

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<sup>1</sup> Our ruling in this case in no way precludes the petitioner from filing a post-conviction petition on his claim of ineffective assistance of counsel.